No. 4946

United States

Circuit Court of Appeals

For the Ninth Circuit.

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KETCHIKAN LUMBER & SHINGLE COMPANY, a Corporation,

Plaintiff in Error,

vs.

A. WALKER,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Division Number One.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

A. H. ZIEGLER, Esq., Ketchikan, Alaska,
Attorney for Plaintiff in Error,

GEO. B. GRIGSBY, Esq., Ketchikan, Alaska,
Attorney for Defendant in Error.

In the District Court for the Territory of Alaska, Division Number One, at Ketchikan.

No. 871–KA.

A. WALKER,

Plaintiff,

vs.

KETCHIKAN LUMBER & SHINGLE COMPANY, a Corporation,

Defendant.

COMPLAINT.

Plaintiff complains of the above-named defendant and for cause of action alleges:

I.

That defendant is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, and at all times hereinafter stated was engaged in the operation of a lumber and shingle mill in Ketchikan, Alaska.

II.

That on or about the 25th day of April, 1925, the

plaintiff herein was an employee of said defendant, and on said date was engaged in performing services for said defendant in its said mill, as operator of a trim saw.

III.

That at all times hereinbefore and hereinafter mentioned the defendant was operating said mill under a contract with [1*] all its employees, including this plaintiff, to pay compensation to said employees for injuries sustained arising out of and in the course of their employment, according to the provisions of Chapter 98 of the Session Laws of Alaska, of 1923, and prior to said 25th day of April, 1925, defendant had agreed with plaintiff to pay compensation for any injuries received in the course of his employment according to the provisions of the aforesaid act.

IV.

That on the 25th day of April, 1925, while plaintiff was engaged, as aforesaid, as a trimmer in the employ of the said defendant, in its said mill, and in the operation of a trim-saw therein and while performing his duties in such capacity in the said mill of defendant, the said trim-saw, which said plaintiff was operating as aforesaid, became out of order and out of place so that and in such a manner that this plaintiff, without fault or design on his own part was severely cut on his right hand, and as a result of said injury, said hand became and is now partially and permanently disabled.

*Page-number appearing at the foot of page of original certified Transcript of Record.

That at the time of said injury the said defendant had in its employ, in said mill, and engaged in the operation of said mill, more than five employees.

V.

That at the time of said injury above described, plaintiff was and is now a married man, having dependent upon him for support a wife and seven children; that plaintiff is and has been for many years past dependent altogether upon his labor as a means of earning a living and supporting his family; that prior to said injury plaintiff was capable of earning, [2] and did earn on an average, six dollars and fifty cents per day, and was at the time of said injury receiving from said defendant the sum of five dollars and twenty cents per day; that on account of said injury said plaintiff has been ever since the date of said injury, partially disabled and said injury is of a permanent character, and said plaintiff will continue to be partially disabled from performing manual labor indefinitely; that as a result of said injury plaintiff has permanently lost the use of his right hand; that prior to said injury plaintiff was in excellent physical condition and at all times fit to work at manual labor; that as a result of said injury, plaintiff's nerves have been shattered and his general health impaired.

Wherefore plaintiff alleges that by reason of the premises he has been damaged in the sum of Six Thousand Two Hundred and Forty Dollars ($6,240.00).

VI.

That the sum of five hundred dollars ($500) is a reasonable attorney fee to be allowed by the Court as a part of the costs of this action.

WHEREFORE plaintiff demands judgment in the sum of Six Thousand Two Hundred and Forty Dollars ($6,240) and for his costs and disbursements herein, including the sum of Five Hundred Dollars ($500) attorney fee.

GEORGE GRIGSBY.

United States of America,
Territory of Alaska,—ss.

A. Walker, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof and the same is true as he verily believes.

A. WALKER. [3]

Subscribed and sworn to before me this 15th day of October, 1925.

[Notarial Seal] JESSIE GRIGSBY,
Notary Public for the Territory of Alaska, Residing at Ketchikan.

My commission expires August 12, 1928.

This is to certify that the within and foregoing is a true and correct copy of the original complaint on file herein.

Filed Oct. 15, 1925. [4]

[Title of Court and Cause.]

DEMURRER.

Comes now the defendant and demurs to the complaint of the plaintiff on file herein and for ground of demurrer, alleges as follows:

I.

That the said complaint does not state facts sufficient to constitute a cause of action.

Dated at Ketchikan, Alaska, this 9th day of March, 1926.

A. H. ZIEGLER,
Attorney for Defendant.

Copy received and service admitted this 9th day of March, 1926.

GEO. B. GRIGSBY,
Attorney for Plaintiff.

Filed Mar. 10, 1926.

Thereafter, to wit, on the 15th day of April, 1926, the foregoing demurrer was by the Court overruled and an exception allowed the defendant. [5]

[Title of Court and Cause.]

AMENDED ANSWER.

Comes now defendant and answering the complaint of the plaintiff, admits, denies and alleges as follows:

I.

Defendant alleges that it is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska and is qualified to do and is doing business in the Territory of Alaska and has paid its annual license fee last due the Territory of Alaska.

II.

Answering paragraph I of the complaint, defendant admits the same.

III.

Answering paragraph II of the complaint, defendant admits the same.

IV.

Answering paragraph III of the complaint defendant admits the same.

V.

Answering paragraph IV. of the complaint defendant denies that plaintiff was injured by the trim-saw described in paragraph IV becoming out of order and denies that as a result of said injury said hand became and is now totally and permanently disabled and admits the remaining allegations in said paragraph contained.

VI.

Answering paragraph V. of the complaint, defendant, for lack of positive information, denies the same down to the [6] word "and" in line 8, paragraph V; admits plaintiff at the time of the injury was receiving the sum of $5.20 per day;

denies that on account of said injury plaintiff has been ever since the date of said injury totally disabled; denies that said injury is of a permanent character; denies that plaintiff will continue to be totally disabled from performing manual labor indefinitely; denies that as a result of said injury plaintiff has permanently lost the use of his right hand; denies that prior to said injury he was in excellent physical condition and at all times fit to work at manual labor; denies that as a result of said injury plaintiff's nerves have been shattered and his general health impaired.

VII.

Answering paragraph VI of the complaint, defendant denies the same.

Further answering said complaint and as an affirmative defense, defendant alleges:

I.

Defendant alleges that it is a corporation organized and existing under and by virtue of the laws of the Territory of Alaska and is qualified to do and is doing business in the Territory of Alaska and has paid its annual license fee last due the Territory of Alaska.

II.

That the plaintiff has not sustained, by reason of the injury complained of in the complaint, an injury causing greater than seventy-five per cent (75%) of the loss of the use of the hand and defendant confesses judgment in the sum of $2,340,

that sum being 75% of the loss of the use of the hand to which plaintiff is entitled under the compensation law of Alaska. [7]

III.

That defendant has paid plaintiff, on account of said injury, the sum of $218.40, and that there is now due and owing plaintiff from defendant the sum of $2,340, less $218.40, making a balance of $2,121.60, in which sum defendant now confesses judgment.

WHEREFORE, defendant prays that plaintiff take nothing by his action herein except the sum in which judgment is confessed.

A. H. ZIEGLER,
Attorney for Defendant.

United States of America,
Territory of Alaska,—ss.

W. C. Mitchell, being first duly sworn, on oath deposes and says: that I am the President of the above-named defendant corporation; have read the foregoing amended answer, know the contents thereof and that same is true as I verily believe.

W. C. MITCHELL.

Subscribed and sworn to before me this 6th day of May, 1926.

[Notarial Seal] A. H. ZIEGLER,
Notary Public for Alaska.

Filed May 6, 1926. [7a]

[Title of Court and Cause.]

REPLY TO AMENDED ANSWER.

Comes now the plaintiff herein and replying to the amended answer of the defendant filed herein, admits, denies and alleges as follows:

I.

Denies the allegation contained in Paragraph II of the affirmative defense set forth in said answer, "that plaintiff has not sustained by reason of the injury complained of in the complaint, an injury causing greater than seventy-five (75%) per cent of the loss of the use of the hand," and in that behalf plaintiff alleges that by reason of said injury said hand has been and now is totally disabled.

II.

Plaintiff denies the allegations contained in paragraph III of said affirmative defense, except that plaintiff admits that the defendant has caused to be paid to plaintiff, at various times within a few weeks after the date of the injury to plaintiff, certain sums of money, the amounts of which plaintiff does not know and is therefore unable to state.

GEO. B. GRIGSBY,
Attorney for Plaintiff.

United States of America,
Territory of Alaska.

A. Walker, being first duly sworn, deposes and says: that he is the plaintiff in the above-entitled

action, that he has read the foregoing reply and knows the contents thereof, and that the same is true as he verily believes.

A. WALKER.

Subscribed and sworn to before me this 6th day of May, 1926.

[Seal] KATHERINE L. KEHOE,
Dep. Clerk.

Filed May 6, 1926. [7b—8]

[Title of Court and Cause.]

SPECIAL QUESTIONS TO BE PROPOUNDED TO THE JURY.

Question No. 1: Has the injury to the plaintiff's hand, as complained of, diminished his earning capacity more or less than if the hand had been completely severed between the wrist and elbow?

Answer: More.

Question No. 2: If the injury to plaintiff's hand has diminished his earning capacity more than if the hand had been completely severed between the wrist and elbow, what is the percentage of loss of earning capacity of plaintiff by reason of such injury?

Answer: Sixty-five per cent (65%).

Question No. 3: If the earning capacity of plaintiff was not diminished more than if he had lost

his hand, what is the percentage of loss of earning capacity in comparison with the loss of the hand?

Answer: ————————————.

NOTE: If you answer question 1 that his earning capacity has been diminished more by reason of the injury, you need not answer question 3. If you answer question 1 that it has been diminished less than if the hand had been completely severed, you need not answer question 2.

I. G. PRUELL,
Foreman.

Entered Court Journal, Volume 2, page 314.

Filed May 7, 1926. [9]

[Title of Court and Cause.]

MOTION FOR JUDGMENT FOR DEFENDANT.

Comes now defendant by its attorney and moves the Court to enter judgment herein for the defendant and set aside the verdict of the jury for the reason that the verdict is contrary to the law and the evidence and that there is no evidence to sustain the verdict rendered in favor of the plaintiff.

Dated at Ketchikan, Alaska, May 10, 1926.

A. H. ZIEGLER,
Attorney for Defendant.

Copy received and service admitted this 10th day of May, 1926.

GEORGE GRIGSBY,
Attorney for Plaintiff.

Filed May 10, 1926. [10]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Comes now the defendant by its attorney and moves the Court to set aside the verdict of the jury herein and grant defendant a new trial of this cause upon the following grounds, to wit:

I.

The Court erred in overruling the demurrer to the complaint of plaintiff.

II.

The Court erred in refusing to grant defendant's motion for nonsuit and to direct a verdict in favor of the defendant.

III.

The Court erred in permitting the plaintiff to amend the complaint in the above action after the conclusion of the evidence and the argument of the cause by both counsel and immediately prior to instructing the jury, which amendment was not in accordance with law and which substantially changed the cause of action set forth in the complaint.

IV.

That the findings of the jury with reference to the loss of earning capacity of the plaintiff were excessive, which findings were given under the influence of passion and prejudice. [11]

V.

That the verdict and findings of the jury were contrary to the law and the evidence and were returned in absolute disregard of the evidence and the instructions of the Court and for the reason of insufficient evidence to justify the verdict and findings, and that the said verdict and findings are against the law.

VI.

The Court erred in permitting the plaintiff to testify that the injury described in the complaint was due to the negligence of the defendant over the objection of defendant and to which defendant excepted, for the reason that the action was based on the Compensation Law of Alaska and the defendant admitted that the action arose out of and in the course of plaintiff's employment and that the defendant was responsible for the compensation to which plaintiff was entitled under the law.

Dated at Ketchikan, Alaska, this 10th day of May, 1926.

A. H. ZIEGLER,
Attorney for Defendant.

Copy received and service admitted this 10th day of May, 1926.

G. B. GRIGSBY,
Attorney for Plaintiff.

Filed May 10, 1926. [12]

[Title of Court and Cause.]

OBJECTIONS TO ENTRY OF JUDGMENTS PROFFERED THE COURT BY PLAINTIFF.

Comes now defendant, by its attorney, A. H. Ziegler, and objects to the entry of the proposed judgments tendered to the above court and for ground of objection alleges:

I.

That the plaintiff is not entitled to judgment against the defendant as proposed in the judgments tendered the Court for the reason that the proposed judgments are contrary to the evidence and law in the above-entitled case.

II.

That under the verdict and findings of the jury in the above-entitled action the plaintiff is not entitled to judgment in greater sum than $4,056.00, less the sum of $218.00 admitted to have been paid by defendant to plaintiff.

III.

That the judgments proposed by plaintiff are not

in accordance with the verdict, findings, facts and law in the above-entitled case.

Dated this 27th day of May, 1926.

A. H. ZIEGLER,
Attorney for Defendant.

Filed Jun. 7, 1926. [13]

In the District Court for the Territory of Alaska, Division Number One, at Ketchikan.

No. 871–KA.

A. WALKER,

Plaintiff,

vs.

KETCHIKAN LUMBER & SHINGLE COMPANY, a Corporation,

Defendant.

JUDGMENT.

This cause came on for trial in the above-entitled court on the 6th day of May, 1926, the plaintiff appearing in person and by his attorney, George B. Grigsby, and the defendant appearing by its attorney, A. H. Ziegler. A jury having been regularly impaneled and sworn to try said action, witnesses on the part of plaintiff and defendant were duly sworn and examined and the evidence being closed the cause was argued by counsel and submitted to the jury, and the jury having retired to consider the same, thereafter, on the 7th day of

May, 1926, returned into court with a finding in favor of the plaintiff, and to the effect that plaintiff had suffered a loss of earning capacity of sixty-five per cent (65%) by reason of the injury complained of in his said complaint.

Wherefore, by reason of the premises aforesaid, and by virtue of the law, and it appearing to the Court from the evidence in the case that the plaintiff belongs to the class that would entitle him to recover the sum of Seventy-eight Hundred Dollars ($7,800), under the provisions of chapter 98, Session Laws of Alaska, 1923, had he been totally and permanently disabled and it further appearing from the evidence in the case that plaintiff has been paid the sum of Two Hundred and Eighteen Dollars ($218) by defendant on account of his said injury,— [14]

IT IS ORDERED, ADJUDGED AND DECREED that said plaintiff have and recover from said defendant, Ketchikan Lumber & Shingle Company, a corporation, the sum of Four Thousand Eight Hundred and Fifty-two Dollars ($4,852), together with his costs and disbursements herein taxed at $42.95.

THOS. M. REED,
District Judge.

Dated this 7th day of June, 1926.

To the signing of the foregoing, the defendant is allowed an exception and is allowed sixty days from the 7th day of June, 1926, to prepare and file a bill of exceptions herein, and during said twenty days execution on the above judgment is

hereby stayed, upon the filing by defendant of a bond in the sum of Five Thousand Dollars ($5,000).

THOS. M. REED,
District Judge.

Filed June 7, 1926.

Entered Court Journal, Vol. 2, page 335. [15]

[Title of Court and Cause.]

BOND FOR STAY OF EXECUTION.

KNOW ALL MEN BY THESE PRESENTS: That we, the Ketchikan Lumber & Shingle Company, a corporation, of Ketchikan, Alaska, as principal and H. M. Sawyer, of Ketchikan, Alaska, as surety, are held and firmly bound unto the above-named A. Walker, in the sum of Five Thousand $5,000 Dollars, to be paid to the said A. Walker, for which payment well and truly to be made we bind ourselves and each of us and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed this 18th day of June, 1926.

The condition of the above obligation is such that whereas a judgment was entered on the 7th day of June, 1926, in the above-entitled court and cause in favor of the plaintiff, A. Walker, and against the defendant, Ketchikan Lumber & Shingle Company, a corporation, in the sum of $4,852, and

whereas, the said defendant desires to sue out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment and whereas an order has been issued to stay execution on said judgment for a period of sixty days,—

NOW, THEREFORE, if the above-bounded Ketchikan Lumber & Shingle Company shall prosecute said writ of error to effect and answer all costs and damages which might accrue to the said plaintiff, A. Walker, by virtue of said stay of execution, then this obligation shall be void; otherwise the same shall be in full force and effect.

KETCHIKAN LUMBER & SHINGLE COMPANY, a Corporation.

By W. C. MITCHELL,
Principal. [16]

H. M. SAWYER,
Surety.

O. K. as to form.

GEORGE B. GRIGSBY,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

I, H. M. Sawyer, being first duly sworn, on oath depose and say that I am a resident of the Territory of Alaska, Division Number One; that I am not an attorney or counsellor at law, marshal, clerk of any court or other officer of any court, and that I am worth the sum of $5,000 over and above all

my just debts and liabilities and exclusive of property exempt from execution.

H. M. SAWYER.

Subscribed and sworn to before me this 18th day of June, 1926.

[Notarial Seal] A. H. ZIEGLER,
Notary Public for Alaska.

Approved this 21st day of June, 1926.

THOS. M. REED,
Judge.

Filed June 23, 1926. [17]

[Title of Court and Cause.]

BILL OF EXCEPTIONS.

BE IT REMEMBERED: That on the sixth day of May, 1926, this cause came on for trial before the above-entitled court and a jury duly impaneled and sworn.

The plaintiff, defendant in error, being represented by Mr. Geo. B. Grigsby.

The defendant, plaintiff in error, being represented by Mr. A. H. Ziegler.

A jury having been impaneled, accepted and sworn, opening statements were made to the Court and jury by Mr. Geo. B. Grigsby on behalf of the plaintiff, and by Mr. A. H. Ziegler on behalf of the defendant.

Whereupon, the jury being excused, after argument by counsel, the Court allowed the filing of an

(Testimony of A. Walker.)

amended answer, and further proceedings were had as follows, to wit:

Mr. ZIEGLER.—Now, as to the third paragraph of the amended answer, in regard to payments, it is understood that this is deemed denied. It is stipulated that the record may show that all the affirmative matter in the affirmative defense is denied by the plaintiff, which compels us to prove it, and Mr. Grigsby can file a reply afterward.

Whereupon the plaintiff, to maintain the issues on his part, introduced the following evidence, to wit: [18]

TESTIMONY OF A. WALKER, FOR PLAINTIFF.

A. WALKER, the plaintiff herein, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRIGSBY.)

Q. State your name.

A. Arch Walker.

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. Do you know the defendant company, the Ketchikan Lumber & Shingle Company?

A. I do.

Q. Who is the superintendent of that company?

A. Mr. Mitchell.

Q. Were you in the employ of that company on the 25th day of April, 1925? A. Yes, sir.

(Testimony of A. Walker.)

Q. In what capacity?

A. Operating a trim-saw.

Q. A trim-saw? A. Yes, sir.

Q. How long have you lived in Ketchikan?

A. Two years.

Q. What has been your business or occupation before you came to Ketchikan?

A. Well, I worked in the mines.

Q. Are you a miner? A. Yes, sir.

Q. Now, has that been exclusively your—

Mr. ZIEGLER.—(Interrupting.) That's leading, if the Court please. [19]

Q. Anything else?

A. Well, I worked on the railroad before I went to the mine.

Q. Have you ever done anything except hard labor? A. No, sir.

The COURT.—That is, manual labor?

A. Manual labor.

Q. Now, you were operating a trim-saw for the Ketchikan Lumber Company? A. Yes.

Q. What wages were you getting?

A. Five-twenty.

Q. Now, what happened—

The COURT. — (Interrupting.) Five-twenty how?

Q. Was that a day—five dollars and twenty cents a day? A. Five-twenty a day.

Q. What happened on the 25th of April, 1925?

Mr. ZIEGLER.—If the Court please, I object to that, as under the pleadings it is immaterial

(Testimony of A. Walker.)

what happened. It is admitted in this case that the plaintiff received an injury there, for which we are responsible. We don't deny responsibility. How it occurred doesn't make any difference. Now, the only dispute about the injury is that he claims that it was due to negligence and they deny that it was due to negligence.

Mr. GRIGSBY.—If the Court please, I'll read the answer. (Reads:) "Answering paragraph IV of the complaint, *defend* denies that the plaintiff was injured by the trim-saw, as described in paragraph IV becoming out of order."

Mr. ZIEGLER.—That is an immaterial allegation. I still insist on the objection that it cannot be introduced in [20] *in* evidence in this case for any other purpose than to prejudice the jury against the defendant.

The COURT.—I think I'll admit it under the peculiar denial of the answer.

Mr. ZIEGLER.—Well, I'll take an exception, if the Court please.

Q. What happened to you on the 25th of April, 1925, while you were working for this company?

A. Well, the saw was in a frame, one of these old-fashioned wood frames, and it swung overhead, and the belt from the main shaft, it runs from the main shaft to the saw where I was operating and it had a rope, half-inch cotton rope, hemp rope rather, with about fifty pounds of weight to hold it in position, and we had to hold it back in posi-

(Testimony of A. Walker.)

tion and in operating the saw, the rope through the sheave wheel finally wore in two—

The COURT.—(Interrupting.) Well, I don't think it is necessary to describe the nature of the rope.

A. Well, the rope broke and let the saw swing through. You see the belt pulled the saw towards me. That pulled the saw and that jerked it through as I reached around to get the other end of the board. I cut the board in two and I reached like this (showing) to get the other end of the board. Just as I reached, why the rope broke and the saw swung through and hit my hand.

Q. What did it do to your hand?

A. Well, it cut those three fingers and the thumb the bone completely in two.

Q. Which hand? A. Right hand. [21]

Mr. GRIGSBY.—I would like to have the witness step in front of the jury so that they can observe the hand.

(Witness leaves stand and exhibits hand to the jury.)

Q. How deep was the cut?

A. Well, it cut plumb through to the—plumb through all the nerves and the leaders and the bone. This just swung over (showing).

Q. Now, what did you do after the accident?

A. Well, they had taken me up to the office and then brought me in to the hospital on a truck.

Q. Did that injury have any effect on you other than injuring your hand, immediately, I mean?

(Testimony of A. Walker.)

A. Yes, sir.

Q. What effect?

A. Well, it shocked my whole system.

Q. What happened to you on the way to the hospital, if anything?

A. Well, I didn't know anything from the time I left there till I got to the hospital, when they had taken me off the truck.

Q. How long were you in the hospital?

A. Well, I was in there very near two months.

Q. Two months? A. No; not quite two months.

Q. In the hospital? A. Yes, sir.

Q. What was your condition when you came out?

A. Well, it was very poor.

Q. What was your physical condition before this injury?

A. Well, I was in good health; worked all the time. [22]

Q. Well, had you ever been incapacitated on account of your health? A. No, sir.

Q. Have you been able to perform any manual labor since? A. No, sir.

Q. What effect, if any, has it had on your nervous system?

A. Well, my nerves is not as good as they was.

Q. I will ask you if at the present time there is any suffering on account of the hand which affects you physically?

A. Well, I can't rest as good as I did. My nerves bother me.

Q. Any pain? A. My arm pains me.

(Testimony of A. Walker.)

Q. To what extent?

A. Well, it's worse at times than others.

Q. What part of the time does it pain you?

A. Well, mostly in fair weather; change in the weather, it bothers me worse.

Q. Does it bother you any in good weather?

A. No; not much.

Q. In damp weather?

A. Yes, sir; bothers me worse in damp weather.

Q. Well, what proportion of the time does it pain you?

A. Well, my hand, right here (indicating) it pains all the time and the hand is cold very nearly all the time. It don't get the right circulation.

Q. Now, to what extent does your arm pain you?

A. Well, my arm pains me quite a bit in my shoulder.

Q. To what extent can you use that hand?

A. I can't use it for anything much.

Q. To what extent, at the present time, are you able to perform manual labor? [23]

A. None at all.

Q. How many children have you?

A. I have seven.

Q. How old is the oldest one?

A. Well, she's sixteen.

Q. And the rest are all younger than that?

A. Yes, sir.

Q. Unmarried? A. Yes, sir.

Q. Have you any other means of supporting your family than by your labor? A. No, sir.

(Testimony of A. Walker.)

Q. What jobs have you succeeded in getting after this injury to your hand?

A. Well, I got a job working down at this mill, at the Ketchikan Spruce Mills.

Q. When did you get that?

A. The seventh of April.

Q. Prior to that what work had you obtained?

A. None at all.

Q. Had you tried to get work?

A. Yes, sir; I have tried to get work and could have gotten two jobs, but I wasn't able to do the work.

Q. At the present time what are you getting down there? A. Hundred dollars a month.

Q. That's as night watchman? A. Yes, sir.

Q. Do you know how long that will last?

A. No, sir; I do not.

Q. Are you doing the same work that the man that had the job before you did? [24] A. No, sir.

Mr. GRIGSBY.—That's all.

Cross-examination.

(By Mr. ZIEGLER.)

Q. Mr. Walker, where were you married?

A. I was married in Bollinger County, Missouri.

Q. In Missouri? A. Yes, sir.

Q. What is the name of the place?

A. Lutesville.

Q. When were you married? A. In 1906.

Q. You say that your arm pains you some time during a change of weather, a change in climate?

(Testimony of A. Walker.)

A. Yes, sir.

Q. Do you have any other pains in any other part of your body?

A. My nerves bother me quite a bit.

Q. Well, I am asking you if you have any pains in any other part of your body? A. No.

Q. Outside of your nerves, you don't feel any effect of the injury other than in your hand now?

A. Well, I am not as strong as I was. I'm weaker.

Q. Now, you have been working, you say, as night watchman? A. Yes.

Q. Have you tried to get work that didn't involve the use of your hand, such as clerking in the hotel, night clerk, or as day clerk, something like that, at a store? [25]

A. I tried to get a job all over town and I haven't been able to get any job only that one that I could handle. I was offered two different jobs, but after they found out my condition, they wouldn't take me.

Q. That would involve manual labor, those jobs?

A. Yes, sir.

Q. Now, Mr. Walker, you have seen men without one hand doing manual labor, haven't you?

Mr. GRIGSBY.—It's immaterial and argumentative.

Mr. ZIEGLER.—Well, now, if the Court please, I don't know whether it is immaterial or not.

The COURT.—He may answer.

(Testimony of A. Walker.)

A. Well, I have never seen any one do any labor with one hand manual labor; no, sir.

Q. You know Mr. McKinney who is working down at the mill here? A. Yes.

Q. He has a hook on his hand? A. Yes, sir.

Q. And works at saw filing and one thing and another? A. Yes, sir; he is a saw filer.

Q. Do you feel that you are worse off than if your hand had been cut off? A. I certainly do.

A. But you wouldn't be willing to have your hand cut off to have a hook put on?

A. No, sir; I don't want my hand cut off. But he uses the hook. He has the hook that he uses to do the lifting in place of his hand.

Q. Well, an operation would enable you to be in the same position, wouldn't it, if you claim that your hand is of no [26] use to you and pains you? Have you found out whether an operation, by removing the hand and having a hook placed on your arm, would permit you to do work like he is doing? You say you are not qualified to do any other kind of work or labor. Wouldn't it?

A. Well, if I had a hook on, I could do more work.

Q. And that could be done by an operation?

Mr. GRIGSBY.—Well that's calling for a conclusion. I object to it.

The COURT.—Yes.

Mr. ZIEGLER.—Well, if the Court please, as I understand the law, if a person can be made to do full time labor or possibly as much as he did be-

(Testimony of A. Walker.)

fore, by an operation, the law requires—

The COURT.—(Interrupting.) Well, you have all gone over that and the jury can draw their own conclusions from what his answer was.

Q. Now, you are making, at the present time, a hundred dollars a month? A. Yes, sir.

Q. And before you were injured you worked six days a week? A. Yes, sir.

Q. At $5.20 a day. How much would that be? How much would that usually total?

A. It would be about $134.

Mr. ZIEGLER.—I think that's all.

Redirect Examination.

(By Mr. GRIGSBY.)

Q. Prior to this injury, were you steadily employed? [27] A. Yes, sir.

Q. And were you able to get work at all times?

A. Yes, sir.

Q. With reference to this position, will you tell how you came to get it, your present job?

Mr. ZIEGLER.—Object to that as immaterial, as to how he happened to get the job.

The COURT.—Yes.

Mr. ZIEGLER.—The question is as to his earning capacity.

The COURT.—Objection sustained.

Mr. GRISGBY.—The purpose of the question is, I just want to show that it was just simply a job.

The COURT.—Well, so is any other job simply a job. Objection sustained.

Mr. GRIGSBY.—That's all.

TESTIMONY OF EDWARD C. ERICKSON, FOR PLAINTIFF.

EDWARD C. ERICKSON, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRIGSBY.)

Q. State your full name.

A. Edward C. Erickson.

Q. Do you know the Ketchikan Lumber & Shingle Company? A. Yes, sir.

Q. Do you know the plaintiff? A. Yes, sir.

Q. Where were you at the time that he was injured, as he has just stated? A. Mr. Walker?

Q. Yes. [28] A. I was in the lumber-shed.

Q. In the employ of the company?

A. Yes, sir.

Q. And you had observed Mr. Walker before his injury, about the premises?

A. Sure. I was up there quite often.

Q. Are you able to state what his general physical condition now is as compared with what it was then? A. Why, there is no comparison.

Q. What do you mean by that?

A. Well, he is not the man now that he was before.

Q. That is, as to his general ruggedness?

A. Yes, sir.

Q. Were you present when the accident occurred?

A. No, sir.

(Testimony of Edward C. Erickson.)

Q. Did you arrive there shortly afterward?

A. No, sir.

Q. Did you have anything to do with taking him to the hospital? A. Yes, sir.

Q. From that place?

A. No, sir; from the shed.

Q. From the shed?

A. Of the lumber company.

Q. That is all part of the same building?

A. No; different building.

Q. How close? A. Probably 300 feet.

Q. Well, after you took him to the hospital, what did you do?

A. Went back down to the lumber-yard. [29]

Q. Did you look at this trim-saw? A. Yes, sir.

Q. (Continuing.) That he spoke about. What was its condition as to being out of order?

A. Well, there was nothing wrong—

Mr. ZIEGLER.—(Interrupting.) I object to that.

The COURT.—Never mind. Objection sustained. It's not a question of whether it got out of order. It was an accident occurring in the course of his employ.

Mr. ZIEGLER.—We admit that.

The COURT.—That has been admitted. You may describe how the accident occurred to show that it occurred in the course of his employ.

Mr. ZIEGLER.—If the Court please, I move at this time that the jury be instructed that the

(Testimony of Edward C. Erickson.)

question whether the injury occurred through negligence or not is immaterial in this case.

The COURT.—Yes, it is immaterial. If it occurred through the negligence of the plaintiff in the action, that wouldn't make any difference. If it occurred through the negligence of the defendant, it wouldn't make any difference in the amount of damages. The only question is whether it occurred in the course of his employment. If it did, he is entitled to compensation.

Q. How many men were in the employ of this shingle company?

Mr. ZIEGLER.—That's admitted.

The COURT.—That's admitted in the pleadings.

Q. What occurred, if anything, to Mr. Walker, on the way to the hospital?

A. Why, he fainted. That is the only thing that occurred to him. [30]

Q. How many times? A. Three times.

Mr. GRIGSBY.—Take the witness.

Whereupon the court took a recess to 2 P. M.

Thursday, May 6, 1926.

Court met pursuant to recess at 2 o'clock P. M.

TESTIMONY OF J. H. MUSTARD, FOR PLAINTIFF.

J. H. MUSTARD, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRIGSBY.)

Q. State your name. A. J. H. Mustard.

(Testimony of J. H. Mustard.)

Q. What is your profession? A. Physician.

Q. You know the plaintiff, Mr. Walker.

A. Yes, sir.

Q. Did you have occasion to attend him on the occasion of his injury a year ago last April?

A. Yes, sir.

Q. At the Ketchikan Lumber & Shingle Company's plant? A. Yes, sir.

Q. And you treated him during the time that he was laid up? A. I have.

Q. What is the extent of that injury?

A. At the time of the injury, the second, third and fourth metacarpal bones of the right hand were cut or sawed through and all the nervs and tendons on the upper surface of the hand at the same time.

Q. Have you examined the hand recently?

A. Yes, sir. [31]

Q. When? A. As recently as yesterday.

Q. What was the condition of it yesterday, as compared with what it was after the injury healed up shortly after the time that you treated him?

A. Some degree of improvement; not a great deal; a little more flexibility at the joints, but the improvement was not very marked.

Q. Is the improvement negligible?

A. I wouldn't say negligible, but it is small.

Q. On yesterday when you examined him, what would you say was the extent of disability of the hand, mathematically expressed?

A. Well, that is something that it is difficult to

(Testimony of J. H. Mustard.)

arrive at by mathematics, but I should say that the degree of disability was between eighty and ninety per cent.

Q. That is anatomically speaking, I suppose, as a physician or surgeon?

A. It is so difficult to arrive at mathematics in those cases.

Q. Yes, I know, but for practical purposes, what would you say?

A. I will confine myself to the original statement —about eighty or ninety per cent.

Q. Sir?

A. I will confine myself to the original statement, between eighty and ninety per cent.

Mr. GRIGSBY.—That's all.

Cross-examination.

(By Mr. ZIEGLER.) [32]

Q. Doctor, do I understand your testimony to mean that the function of the hand—that is, the movements of the various joints and muscles and so forth—has been destroyed to the extent of eighty or ninety per cent? A. Yes.

Q. Is that your answer, or do you mean to testify that the usefulness of the hand has been destroyed eighty to ninety per cent?

A. Well, it's a sort of general average. The function of the hand, the moving of the fingers, has been destroyed more than eighty or ninety per cent, but the hand as an implement—

Q. That's what I am getting at.

(Testimony of J. H. Mustard.)

A. The function of the hand as an implement for working with hasn't been destroyed to that extent, but when I say between eighty and ninety per cent, I mean that I think that in my opinion the general usefulness of the hand has been destroyed to about that extent.

Q. Now, Doctor, you stated that there has been some improvement since he was discharged and since your examination yesterday. Is that correct?

A. Yes, sir.

Q. You have had experience with similar injuries? A. Yes.

Q. What is the ultimate tendency of an injury of that kind with reference to the hand acquiring strength and being a useful member?

A. There is, in my opinion, no chance that the hand will get worse. There is always the likelihood of some improvement. [33]

Q. What would you say, Doctor, with reference to acquiring strength by using the hand? What has been your observation and experience with similar injuries?

A. Well, I don't need to tell anyone that with the use of the hand, it will acquire additional strength.

Q. Do people suffering from this kind of injury usually eventually use the hand for various purposes?

Mr. GRIGSBY.—I object to it as too general. It should be confined to the case in question.

(Testimony of J. H. Mustard.)

Mr. ZIEGLER.—I said people suffering from this kind of injury to the hand.

Mr. GRIGSBY.—Yes, injury of this kind, but this particular injury—

Mr. ZIEGLER.—(Interrupting.) Well, if the Court please, I have asked the doctor if he has seen people and treated people and observed people with similar injuries to the hand where the bones and nerves had been severed as he has stated. Now, I think this is proper.

The COURT.—Objection overruled.

The WITNESS.—Will you state the question.

The COURT.—I think you better modify your question.

Q. Doctor, does an injury of this kind result permanently in no practical use of the hand?

A. The resourcefulness of individuals is very great and even what seems to be a useless member often becomes one of very considerable use. Everybody knows that. I don't need to testify to that.

Q. From your examination and treatment of this plaintiff, is there anything that indicates to you that that result might not follow in this case. [34]

A. I have no doubt that with continued necessity for using it, he will be able to use it in a great many ways that he is not able to use it now.

Mr. ZIEGLER.—Now, if the Court please, I would like to call the doctor as my own witness.

The COURT.—Very well.

Q. Doctor, in your examination yesterday, did

(Testimony of J. H. Mustard.)

you examine the plaintiff as to temperature, pulse, blood pressure, and so forth? A. Yes, sir.

Q. What was his condition with reference to being normal? A. Normal.

Q. Did you observe any other effects from this injury in the plaintiff other than this confined to the hand and possibly to the arm?

A. No; I did not.

Q. Did you or did you not examine the plaintiff with reference to his possible nervous condition as a result of the injury?

A. There was no external evidence of any nerve tensing.

Q. In your examination, was there or was there not, any manifestation? A. None at all.

Q. Of any abnormal nervous condition?

A. Not observable.

Q. Doctor, you saw the patient at the time of the injury and treated him then and shortly afterwards? A. Yes, sir.

Q. Now, as you stated, you examined him yesterday. What have you to say with reference to any appreciable difference [35] in his physical appearance with reference to ruggedness and general health?

A. I must say that I can't notice any difference.

Mr. ZIEGLER.—I think that's all.

(Testimony of J. H. Mustard.)

Redirect Examination.

(By Mr. GRIGSBY.)

Q. With reference to observing any effects as to his nerves, that wouldn't necessarily be possible to observe that from the examination you made yesterday, would it?

A. It might not be.

Q. It might not be?

A. Yes.

Q. That is something that isn't manifest, necessarily?

A. It is often some of the parabulia.

Q. Doctor, would you consider this injury a permanent injury?

A. To the hand? Certainly.

Q. And anything you said with reference to possible improvement is all conjectural and not with reference to this particular injury, not exact, not certain?

A. Yes; it is not exact.

Q. What you mean is that the use of any member of the body would tend—

A. (Interposing.) In a great majority of cases.

Q. (Continuing.) To improve that portion of the body, provided the person could use it?

A. Yes.

Q. Are you in any way connected with the Ketchikan Lumber & Shingle Company as a physician?

A. I am not. [36]

Q. As a physician?

(Testimony of J. H. Mustard.)

A. From time to time they refer cases to me and that's all.

Q. You are not the doctor, though?

A. No, sir.

Q. Nor of any insurance company? A. No.

Mr. GRIGSBY.—That's all.

TESTIMONY OF H. C. CARROTHERS, FOR PLAINTIFF.

H. C. CARROTHERS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRIGSBY.)

Q. State your name?

A. Herbert C. Carrothers.

Q. What is your profession, Doctor?

A. Physician and surgeon.

Q. Do you know the plaintiff, Mr. Walker?

A. Yes, sir.

Q. Have you had occasion to examine his hand since he was injured? A. Yes, sir.

Q. When did you first examine him after the injury?

A. Why, I don't recall the date, Mr. Grigsby.

Q. About when?

A. Why, six or eight weeks after his injury, I believe.

Q. Did you examine it recently?

A. Yes, sir.

(Testimony of H. C. Carrothers.)

Q. Now, what was the condition of the hand as to disability when you first examined it six or eight weeks after the injury? [37]

A. Well, at the time that I saw the hand then, it was completely disabled and he was still carrying it in splints and it hadn't healed as I recall it.

Q. That is, at the first examination?

A. Yes.

Q. Did you, shortly after that, after it healed, make another examination?

A. Not officially.

Q. Sir?

A. Not officially, I didn't; no. I saw Mr. Walker because I was taking care of his family from time to time, but made no careful examination of the hand particularly.

Q. Did you send any certificate?

A. Oh, yes.

Q. To the insurance company?

A. Yes, sir.

Q. You examined him before that? A. Yes.

Q. At that time, what was the extent of his disability of the hand?

A. Practically complete disability.

Q. Have you examined him recently?

A. Yes, sir.

Q. How recently? A. Yesterday.

Q. What was its condition then, as to disability, as compared with what it had been?

A. Well, there's a very slight change for the

(Testimony of H. C. Carrothers.)

better. There is very little movement in the thumb and in the first finger, but a very slight improvement in the course of the time since his injury. [38]

Q. To what extent would you say the hand is now disabled?

A. Well, as I explained from an anatomic standpoint, perhaps, it is not a complete loss of the hand. There is, perhaps, somewhere between five and ten per cent function of the hand left; but for actual work, I would say that the hand is not only completely disabled, but he is really less able to work than he would be without the hand.

Mr. GRIGSBY.—Take the witness.

The WITNESS.—Pardon me. I would like to say, in that connection, that that means no criticism whatever on the surgical work that was performed; and I think that it was very brave to make an attempt to save a hand of that sort and the fact that it left such a result means no criticism of the surgeon or the work that was done.

Q. Is this a permanent injury, Doctor?

A. Yes, sir.

Q. Is there any chance of an operation preventing it?

A. Well, that would be very doubtful, but it is possible that there might be some slight improvement following an operation. It might be worth the trial, but the risk—

Q. (Interrupting.) What are the chances of success?

(Testimony of H. C. Carrothers.)

A. Well, I should say the chances were against success.

Mr. GRIGSBY.—That's all.

Cross-examination.

(By Mr. ZIEGLER.)

Q. The inquiry you have described is confined to the hand is it?

A. The hand and the consequent atrophy of the muscles of the arm. That is the worst of it. [39]

Q. Now, in a case of that kind, would the plaintiff have more use of the arm if the hand was amputated and an artificial hand substituted?

A. I believe so.

Q. The point I am making is this. His arm has not been materially destroyed or injured by the injury to the hand, has it?

A. Only secondarily. There is always more or less wasting of the muscles following lack of use.

Q. That's because of the lack of use?

A. Yes, sir.

Q. In the case of an artificial hand, where weights would be lifted with the arm, would that tend to improve the condition of the arm?

A. I believe so.

Q. In other words, Doctor, there is nothing abnormal in the condition of the arm as the result of this injury. It is a condition that usually follows, does it not?

A. I wouldn't say there is nothing abnormal, because a wasted arm is *certain* abnormal..

(Testimony of H. C. Carrothers.)

Q. But is that a condition that usually follows an injury to the hand? A. Yes, sir.

Mr. ZIEGLER.—I wish to call the doctor as my own witness now.

The COURT.—You may call him as your own witness.

Q. Doctor, you were present when the plaintiff was examined yesterday? A. Yes, sir.

Q. Did you notice his condition with reference to his pulse, [40] temperature and blood pressure? A. Yes, sir.

Q. What was that?

A. Practically normal.

Q. Did you observe the patient with reference to any external or obvious manifestations of a nervous condition? A. Yes.

Q. Did you observe any manifestations of a nervous condition, Doctor?

A. No; I can't say there is any objective findings to indicate any marked nervous disturbance.

Q. The injury that you have seen in the plaintiff, is it or is it not confined to the arm; that is, the hand and the arm? A. Yes, sir.

Q. Did you find any other traces of the injury in any other portion of his body? A. No.

Q, Doctor, there is no—

A. There is no objective evidence of it.

Q. Is there any likelihood of there being any in an injury of this kind?

A. Not directly due to the injury itself; no.

Mr. ZIEGLER.—That's all.

(Testimony of H. C. Carrothers.)

Redirect Examination.

(By Mr. GRIGSBY.)

Q. But indirectly, resulting from the injury, would there be a weakening of the system?

A. I don't believe so. [41]

Q. With reference to observing any external evidence of the man's nerves being affected, that wouldn't necessarily be shown up from such an examination as you made yesterday, would it?

A. No; those are subjective symptoms which he might tell me and which I could readily believe, but which there would be no way of proving or disproving.

Q. He either could have had a shock to his nervous system or not, Doctor, so far as an examination of external evidence is concerned?

A. I don't believe such an injury would cause a great deal of shock, as we use the technical term of shock. There might be, undoubtedly a man would worry over a thing like this, over his incapacity and over his lack of being able to support his family and all that sort of thing; but so far as being an injury of that character, any direct shock, I wouldn't regard it, I don't believe.

Q. Whether there is any or not, though, couldn't be observed externally?

A. Well, it could in an extreme case, yes; but it is very likely that a man could have certain symptoms which he could explain very reasonably and yet, unless they were of such a severe character as

(Testimony of H. C. Carrothers.)

to actually cause a definite symptom like shell-shock or something like that—

Q. (Interrupting.) It wouldn't be observable.

A. It wouldn't be observable.

Q. If a man's nervous condition is such, Doctor, that it greatly or substantially interferes with his work, is that usually subject to discovery or does it have manifestations? [42]

A. Well, that is a hard question to answer.

Q. Well, Doctor, there are always symptoms of that kind of condition, aren't there?

A. Not necessarily, I wouldn't say.

The COURT.—I would think that would largely depend upon the nature of the case itself.

Q. What are some of the symptoms of a man suffering substantially from nerves of that sort?

A. Well, the symptoms of which the patient can complain, of a so-called nervous condition, practically run the whole list of human suffering. They complain of most anything—lack of sleep, indigestion and inability to concentrate their minds.

Q. Loss of appetite?

A. Yes, sir. The point is—

Q. (Interrupting.) Physical debility?

A. Yes, sir.

Mr. GRIGSBY.—That's all.

TESTIMONY OF R. V. ELLIS, FOR PLAINTIFF.

R. V. ELLIS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRIGSBY.)

Q. State your full name?

A. R. V. Ellis.

Q. You are a physician and surgeon, Doctor?

A. Yes, sir.

Q. Do you know the plaintiff?

A. Yes, sir.

Q. Have you examined the hand which he had injured at the [43] Ketchikan Lumber & Shingle Company's plant? A. Yes, sir.

Q. When did you first examine it, Doctor?

A. When he was in the hospital. I don't remember the date; about a year ago; something like that.

Q. And did you examine it after it was all healed up? A. Yesterday.

Q. Was that for the purpose of giving an opinion on the degree of disability? A. Yes, sir.

Q. At that time what was the extent of the disability, doctor? A. Yesterday?

Q. Sir? A. The examination yesterday?

Q. No; when you examined it for the purpose of giving a certificate, after it was healed up some months ago?

(Testimony of R. V. Ellis.)

A. Why, I figured ninety per cent disability of function?

Q. At that time? A. Yes.

Q. And did you examine it yesterday?

A. Yes, sir.

Q. What was its condition as to disability at that time, compared with the other examination?

A. About the same.

Q. Is it a permanent injury?

A. In its present state; yes.

Q. Well, what have you to say with reference to the probable success of an operation?

A. That's all problematical.

Mr. GRIGSBY.—That's all. [44]

Cross-examination.

(By Mr. ZIEGLER.)

Q. There is a great deal of work such as plastic surgery being done in cases of this kind, isn't there, Doctor? A. Yes, sir.

Q. You have witnessed cases of this kind, have you? A. Yes, sir.

Q. And some cases which show good results?

A. Yes, sir.

Q. But some, as you say, it is problematical as to the outcome? A. Yes, sir.

Q. Does it often happen in these operations that the hand is worse after the operation, if it isn't improved by the operation? Does it usually follow that it is worse? A. No, sir; not as a rule.

Q. As I understand it, then, the hand is usually

(Testimony of R. V. Ellis.)

improved or it is not made any worse by these operations or this plastic surgery? A. Yes, sir.

Q. Can you explain to the jury what plastic surgery is?

A. Well, in this particular instance, the extensor tendons of the hand are severed, also the nerve supply to the same and, in fact, they can't function unless they're spliced and the question of splicing is sometimes successful and sometimes it isn't.

Q. Now, Doctor, you testified that in your opinion the loss of function was about ninety per cent?

A. Yes, sir.

The COURT.—Now, what do you mean by that, Doctor? [45]

Mr. ZEIGLER.—I was just getting ready to ask the doctor that.

Q. Is it synonymous with 90 per cent of the loss of the hand, or use of the hand, or 90 per cent of the total disability?

A. I think it would be synonymous in that degree. The function of the hand would be ninety per cent disabled with a 90 per cent disability from any other cause.

The COURT.—You mean 90 per cent loss of earning capacity of the plaintiff? A. No.

Mr. ZIEGLER.—He has confined it to the hand entirely.

The COURT.—I noticed that.

Mr. ZIEGLER.—That isn't a surgical question hardly. Supposing a man has lost his hand entirely. Then I don't think that he could swear what

(Testimony of R. V. Ellis.)

his earning capacity is. That depends upon other things.

The COURT.—Well, if he lost his hand entirely, why that would be a matter that should be determined from the statute.

Mr. ZIEGLER.—But for him to testify as to his earning capacity, it depends upon so many things that I don't think that is a matter for expert opinion. It is just as likely within the knowledge of a layman as an expert.

The COURT.—I think it is a very material question in this case.

Mr. GRIGSBY.—I'll ask the doctor some questions on the cross-examination.

Q. Doctor, you say the injury is permanent; that is, as I understand it, the injury to the bones and nerves and tendons is permanent? [46]

A. Excluding surgical interference.

Q. Disregarding any plastic surgery?

A. Yes, sir.

Q. Now, Doctor, wouldn't the hand and arm tend to grow stronger by exercise and use of the hand?

A. Yes.

Q. In what way would that have the result or how would it—

A. (Interrupting.) Just muscular development.

Q. By just muscular development.

A. But it wouldn't increase the function that is completely lost.

Q. You have seen similar cases? A. Yes, sir.

(Testimony of R. V. Ellis.)

Q. That is similar injuries where the bones in the hand, nerves and tendons have been severed?

A. Yes, sir.

Q. Have you observed in late years the result of injuries affecting the use of the hand?

A. Yes, sir.

Q. Is it or is it not the general tendency for the hand to become more useful?

A. Not if the tendons are severed; not yet.

Q. You mean with reference to the functioning, but I mean more useful with reference to getting more strength in the hands? A. Oh, yes.

Q. And has that any particular limit or does that depend more on the resourcefulness and dexterity of the injured person?

A. Well, it depends upon how much exercise and functioning the individual gives it. [47]

Q. Have you seen hands of that kind get into a condition where they are of substantial use to the injured person? A. No, sir.

Q. Not any substantial or practical use?

A. Not in the parts that are involved.

Q. Well, take for instance the lifting of weights, that is, moving the weight like that (indicating)?

A. Oh, yes.

Q. Or lifting a weight in the open hand?

A. Yes.

Q. In that way they have been able to make substantial use of it?

A. I don't know exactly what you mean by "substantial use."

(Testimony of R. V. Ellis.)

Q. Well, any practical use?

A. Well, for the things that you mentioned there.

Q. For instance, if you were going to take a board off this table, say a board twelve inches by ten feet long, could a person use that hand in moving the board with the other hand? A. Yes, sir.

Q. And in that way support the weight?

A. Yes, sir.

Mr. ZIEGLER.—That's all.

Redirect Examination.

(By Mr. GRIGSBY.)

Q. Doctor, could you, as a physician, estimate the loss of earning capacity as a laborer, of the plaintiff, on account of that injury?

A. Manual laborer [48]

Q. Yes; as a physician?

A. Well, manual labor that required the use of both hands, there is 90 per cent disability of the right.

Q. Now, that being so, could you, as a physician, say what is the percentage of total disability of this man as a laborer?

A. Well, the classification of labor is too voluminous to suggest—

Q. (Interrupting.) Manual labor.

A. Manual labor. In the classification of manual labor, there are so many degrees that it would be impossible. Manual labor with a pick and shovel? If you ask me what kind of manual labor—

Q. Well, for instance, being a miner.

(Testimony of R. V. Ellis.)

A. It would be ninety per cent disability on the right side.

Q. He couldn't work as a miner at all with a 90 per cent disability?

A. That would be up to the man that hired him. I don't know.

Q. It would depend upon the possibility of his getting the job? A. Yes, sir.

Q. There are a great many things which take that out of the category of expert evidence?

A. Yes, sir.

Q. Isn't that so? A. Yes, sir.

Mr. GRIGSBY.—That's all.

Recross-examination.

(By Mr. ZIEGLER.)

Q. Doctor, do you know what a bulldozer is in a mine? [49] A. Yes.

Q. That puts dynamite into holes after they have been bored? A. Yes, sir.

Q. Sets the fuse and discharges them. Now, if you state that that hand will gain strength to support some weight, there is nothing that would greatly impair his ability to follow that occupation is there?

A. Yes, sir; the possibility of safety to himself on account of handling. In bulldozing you tap with one hand and you insert the powder with the other and he can't grasp anything up to the present time.

Q. In that way it would? A. Yes.

(Testimony of R. V. Ellis.)

Q. That would be the only interference, with reference to the safety of his employment?

A. Yes.

Q. Otherwise he could perhaps do the work?

A. It's possible to do it.

Q. You are not in a position to say that there are not certain laboring jobs that the man cannot hold?

A. No, sir.

Q. As I understand your testimony, it is this: that he has practically ninety per cent disability on the right. In that way you are placing his earning capacity at 200 per cent. He has a hundred per cent with his left hand and he has lost ninety per cent in his right hand? A. Yes.

Q. In figuring it out on the basis of a hundred per cent, that would be sixty and forty,—wouldn't it—that is, sixty per cent earning power left and forty per cent lost? [50]

A. I couldn't suggest anything on the earning power.

Q. Well, I mean on the ability to work?

A. He has ninety per cent disability on the right.

Q. That is, in one hand?

A. And in the other hand—I have not examined the other hand. I don't know anything about it.

The COURT.—Doctor, I want to ask you a question. You say that the tendons of his hand were cut as well as the bone? A. Yes, sir.

The COURT.—Can't he flex his hand at all?

A. Flex it?

The COURT.—Yes.

(Testimony of R. V. Ellis.)

A. Not very much.

The COURT.—Can't he close the hand?

A. He can close it, but there are adhesions there that prevent his closing it except to a certain degree. The extensors are involved.

The COURT.—The extensors are involved?

A. Yes.

The COURT.—And the adhesions prevent him from closing his hand? A. Yes.

The COURT.—Can he close it with his thumb and forefinger?

A. Yes; the thumb tendon is not involved.

The COURT.—Then he can close it between his thumb and forefinger?

A. But in this particular instance, there was infection and the infection made adhesions, so that the thumb tendon is involved directly due to the severing of the tendon.

The COURT.—But still he can flex the thumb? [51]

A. To a certain degree but not very much—very slightly.

The COURT.—He can grasp things between his thumb and forefinger?

A. He held this thing yesterday (exhibiting cigarette case) after I put it in his hand. He couldn't grab it. That, I imagine, would weigh*t*—I didn't weigh it, but I should think it would weigh about — That was all he could do is to hold it, because the pressure on his finger would let it slip in a few minutes.

(Testimony of R. V. Ellis.)

Mr. GRIGSBY.—Let it slip.

Q. At that time he was there for the purpose of submitting to the examination? A. Yes.

Q. Now, whether he could hold that, actually hold that or whether he dropped that on purpose you don't know? A. I don't know sir.

Mr. ZIEGLER.—I want to call him as my own witness.

The COURT.—You may do so.

Q. Doctor, you examined the patient yesterday with reference to being normal in other ways, did you not? A. Yes, sir.

Q. What did you find with reference to his pulse, temperature and blood pressure, in respect to being normal or abnormal, Doctor?

A. They were normal.

Q. Doctor, did you notice or observe any manifestations of any unusual nervous condition?

A. No, sir.

Q Had there existed any, Doctor, you would have been able to observe them? [52]

A. That's problematical.

Q. Now, Doctor, in your examination of Mr. Walker, did you find that the injury and the effects of the injury were or were not confined to the hand and a possible atrophy of the muscles of the arm?

A. So far as I have ever noticed.

Q. And you could find no signs of any result of the injury to any portion of the body, arms, feet or leg? It didn't interfere with the leg or left arm in any way? A. No, sir.

(Testimony of R. V. Ellis.)

Q. Does an injury of that kind, after a cure as you observed it here, usually cause pains throughout the body and of such a nature as to interfere with his working ability? A. An injury to the hand?

Q. Yes. A. No, sir.

Q. Is an injury of that kind such an unusual shock that it generally undermines a man's nerves?

A. No.

Q. In an average, normal, healthy man, Doctor, would an injury of that kind tend to injure his nerves in such a manner as to interfere with his working? A. From a physical standpoint?

Q. Yes. A. No.

Q. You observed no unusual condition here to take it out of the ordinary case? A. No.

Q. What are the symptoms of a nervous condition such as interferes with a man's ability to work or with the performance of duties. What are some of the symptoms? [53]

A. Sleeplessness and untoward reaction from shock, accelerated muscular movements without due cause.

Q. Agitated condition?

A. Phases of irritability.

Q. Is an agitated condition one? A. Yes.

Q. Is the person usually excitable?

A. Yes, sir.

Q. Loss of appetite?

A. Probably; probably not.

Q. Did the patient complain of any of those symptoms to you?

(Testimony of R. V. Ellis.)

A. No; excepting that he said he was nervous, very nervous.

Q. That was just his statement of it? A. Yes.

Q. There is no way of determining that when there are no manifestations?

A. Not without stimulus that would cause excitability of a patient.

Mr. ZIEGLER.—That's all.

Redirect Examination.

(By Mr. GRIGSBY.)

Q. When you said that there was no physical results from the injury outside of the hand and arm, what did you mean by that, Doctor? Did you mean that there might have been a mental result?

A. It is possible?

Q. A state of mind on account of the injury?

A. Yes.

Q. And it would be injurious to the plaintiff? [54] A. Yes.

Mr. GRIGSBY.—That's all.

Recross-examination.

(By Mr. ZIEGLER.)

Q. Did you observe any such condition in this man? A. No.

Q. Can you state whether or not he seemed to be all right when you examined him?

A. He didn't seem other than normal so far as I could see.

Q. You noticed no abnormal symptoms?

(Testimony of R. V. Ellis.)

A. No.

Mr. ZIEGLER.—That's all.

Redirect Examination.

(By Mr. GRIGSBY.)

Q. You did not see the patient before the injury?

A. I don't think I did. Did I, Walker?

The COURT.—Never mind, now.

Q. What I spoke of as the mental affectation wouldn't be observable anyway from the examination that you made yesterday? A. No.

Q. From the examination that you made yesterday, any effect on the man mentally, such as putting him in a state of fear, loss of courage or anything like that, that wouldn't be observable?

A. No, sir.

Recross-examination.

(By Mr. ZIEGLER.) [55]

Q. If that condition were substantial, it would usually have the symptoms which counsel has just asked you concerning? A. The mental—?

Q. Yes. A. Oh, yes.

Q. The person is depressed and gloomy?

A. Yes.

Mr. ZIEGLER.—That's all.

Mr. GRIGSBY.—We rest.

Mr. ZIEGLER.—Now, if the Court please, I would like to have the jury excused while I make a motion.

(Whereupon the jury retired.)

Mr. ZIEGLER.—The defendant now moves for

(Testimony of W. C. Mitchell.)

a nonsuit and an instructed verdict in its favor, for the reason that there has not been sufficient evidence introduced in the case to support the allegations of the complaint with reference to total permanent disability; and, second, because there is a fatal variance between the proof submitted and the allegations of the complaint.

Whereupon, after argument the Court denied the motion, to which denial the defendant, by its counsel, then and there excepted.

DEFENDANT'S CASE.

The jury having been recalled to box, the defendant, to maintain the issues on its part*y* introduced the following evidence, to wit:

TESTIMONY OF W. C. MITCHELL, FOR DEFENDANT.

W. C. MITCHELL, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. ZIEGLER.)

Q. Mr. Mitchell, what position do you occupy with the defendant company, the Ketchikan Lumber & Shingle Company? [56]

A. I'm president of the company.

Q. President of the company? A. Manager.

Q. Were you such at the time of the injury to Mr. Walker? A. Was I what?

(Testimony of W. C. Mitchell.)

Q. Were you president at that time?

A. I wasn't right there at the time of the accident—

Q. (Interrupting.) No; I mean were you such officer of the company at that time?

A. Oh, yes, sir.

Mr. ZIEGLER.—If the Court please, I will offer in evidence a certificate showing a compliance with the territorial law.

Mr. GRIGSBY.—We admit that the company has complied with the territorial law.

Mr. ZIEGLER.—Well, I offer the certificate in evidence anyway.

The COURT.—Very well.

(Whereupon said certificate was received in evidence and marked Defendant's Exhibit "A.")

Q. You say you were not present when the injury occurred to Mr. Walker? A. No, sir.

Q. And you later on found out about the injury?

A. Yes, sir.

Q. And about the nature of the injury?

A. Yes, sir.

Q. Now, Mr. Mitchell, how much money did you pay to Mr. Walker on account of the injury to his hand; how much compensation? [57]

A. Paid him 218.

Q. Do you know how that was regulated, whether it was half the monthly wages or what?

A. It was half the monthly wages up to a certain time; I think three or four months.

(Testimony of W. C. Mitchell.)

Q. Now, after that did you stop making payments to Mr. Walker? A. Yes, sir.

Q. Why?

A. Well, we tried to get some settlement for the claim, but we were not able to do so; so we thought we better stop payments until we could make a general settlement.

Q. Could you and Mr. Walker agree on the amount that was due under the compensation law?

Mr. GRIGSBY.—That's very evident that they couldn't; hence this lawsuit; and we object to it as immaterial.

A. No; we couldn't agree—

The COURT. — (Interrupting.) Well, never mind. You needn't answer that. It is very evident you couldn't.

Q. Now, Mr. Mitchell, after the defendant's hand was hurt, was he able to work, do you know?

A. Well, I don't know whether he was or not. Mr. Walker and I had some conversation after he got out; a month or so after he got out of the hospital, and he asked me if there would be a chance for him down there, and I told him there would any time and, of course, I didn't know how able he was.

Q. You have heard the condition of his hand described here in court? A. Yes, sir.

Q. Is there any work that he could do, as laborer, in the mill at the present time? [58]

A. I think there is; yes, sir.

(Testimony of W. C. Mitchell.)

Q. What kind of work?

A. Well, there is work there where a man wouldn't have to use his fingers. He would have to use his arm. We have cut-off saws there that we have men to take away—what we call take away. They're box shooks. Now, we have two men permanently on that job and it doesn't require—I don't think it requires fingers. It is more a matter of strength in a man's arms, lifting from the table on to a truck. Well, I thought of something like that. Of course, I don't know that he could do that.

Q. You offered him work there, did you?

A. I told him that we would be very glad to at that time, to give him work, if there was anything that he could do.

Q. Did he ever try to go back to work?

A. No, sir.

Mr. ZIEGLER.—That's all.

Cross-examination.

(By Mr. GRIGSBY.)

Q. That was before the commencement of this lawsuit?

A. Yes, sir. This was shortly after the—oh, yes, several months ago.

Q. Now, you say you paid him $218?

A. That's the record; yes, sir.

Q. How did you pay that, in one amount or different amounts? A. Different amounts.

Q. Did you pay it to him, or who paid it?

(Testimony of W. C. Mitchell.)

A. Why, Mr. Field, who was secretary of the company at that time, paid it to him. [59]

Q. All of it?

A. Why, I think so; yes, sir. There was no one else handling the accounts but the secretary and treasurer of the company.

Q. You don't know what was paid him yourself, then? A. Beg pardon?

Q. You don't know yourself what was paid him?

A. Why, no; except the records there.

Q. Well, wasn't a part of it paid by the insurance company?

Mr. ZIEGLER.—Now, if the Court please, I object to that as incompetent, irrelevant and immaterial.

Mr. GRIGSBY.—Well, he says he paid him $218.

Mr. ZIEGLER.—He doesn't dispute this amount.

Mr. GRIGSBY.—We don't know what the amount was.

Q. Do you know of your own knowledge what was paid to the plaintiff?

Mr. ZIEGLER.—He has testified to that already, if the Court please.

The COURT.—He may answer that.

A. Well, I took—we certainly have the cancelled checks, anything that was paid, and I took these amounts from our books and that's the result. We undoubtedly have the cancelled checks for the amount. I didn't look them up. I didn't bring them down. I figure it's 218 that we paid him.

Q. And that includes everything that has been

(Testimony of W. C. Mitchell.)

paid, whether you paid it or whether somebody else paid it?

A. As I say, the secretary paid it. The record was made on the books. I paid him nothing.

Q. Have you been reimbursed for that? [60]

Mr. ZIEGLER.—Now, if the Court please, we object to that.

The COURT.—Objection sustained.

Mr. GRIGSBY.—That's all.

Redirect Examination.

(By Mr. ZIEGLER.)

Q. As I understand it, the records or your books, so far as your disbursements are concerned, show that Mr. Walker has received that amount of money? A. Yes, sir.

Q. Two hundred and eighteen dollars and forty cents? A. Yes, sir.

Q. You are willing to bring your books here if there is any question about it? A. Yes, sir.

Mr. ZIEGLER,—That's the defendant's case.

REBUTTAL.

Whereupon the plaintiff, to further maintain the issues on his part, introduced the following evidence, to wit:

TESTIMONY OF A. WALKER, FOR PLAINTIFF (IN REBUTTAL).

A. WALKER, the plaintiff herein, having been previously duly sworn, upon being recalled, testified as follows:

Direct Examination.

(By Mr. GRIGSBY.)

Q. Mr. Walker, you heard the testimony of Mr. Mitchell that he offered you work after your injury? A. Yes, sir.

Q. I will ask you if you endeavored to obtain work from that company. Did you try to get work there?

A. I went out there twice to go to work. [61]

Q. What was the result?

A. He told me he didn't have nothing that I could do.

Q. And when was that?

A. That was, well, that was along about the time I went out for the check.

Mr. GRIGSBY.—That's all.

Cross-examination.

(By Mr. ZIEGLER.)

Q. Now, when you went to the mill, did you go to Mr. Mitchell or some of the other men?

A. I went into his office and I told him that Doctor Mustard said that he thought if I could get some light job that I could do, that I could go to work, and Mr. Mitchell said, "I'll see Mr. Mus-

(Testimony of A. Walker.)

tard''; and I went out there again when I went out to get the check, fifty per cent of my wages, and I asked him about going to work and he said he didn't have anything that I could do.

Q. Now, Mr. Walker, isn't it a fact that that conversation occurred downtown here, in which you told Mr. Mitchell what Doctor Mustard said about your getting some light work and that if you could, you could go to work?

A. I was talking to him down here and then on the tenth of the month when I went out to get the check, I went into his office and I asked him about going to work.

Q. Are you sure you went to Mr. Mitchell?

A. Yes, sir; I absolutely am.

Mr. ZIEGLER.—That's all.

Mr. GRIGSBY.—If the Court please, we will admit the payment of $218. [62]

The COURT.—Two hundred and eighteen dollars and forty cents. The jury will take into consideration the admission that has just been made in open court.

Whereupon after argument by counsel, an adjournment was taken to 10 o'clock A. M., Friday, May 7, 1926.

Friday, May 7, 1926.

Court convened at 10 o'clock A. M., pursuant to adjournment.

Mr. GRIGSBY.—At this time the plaintiff moves to amend the complaint to conform with the facts proven, as follows: That in paragraph V, line

eleven, the word "totally" be stricken out and the word "partially" inserted, and in line 13 of the same paragraph the word "totally" be stricken out and the word "partially" inserted.

The COURT.—Do you object?

Mr. ZIEGLER.—Yes, I object.

The COURT.—To the amendment at this time?

Mr. ZIEGLER.—Yes.

The COURT.—The amendment will be allowed.

Mr. ZIEGLER.—I will then take an exception to the ruling of the Court, for the reason that the motion to amend is made too late, not having been made until after the case had been argued to the jury and all arguments concluded; and for the further reason that it is a material change in the complaint which does not give the defendant an opportunity to meet the issue raised by the amendment in the evidence which was submitted before the jury; and for the further reason that the Court is without authority to permit the amendment, being *ex parte,* and that it is against the law. [63]

The evidence being closed, the Court instructed the jury as follows, to wit:

INSTRUCTIONS OF COURT TO THE JURY.

Ladies and Gentlemen of the Jury:

This action was brought by the plaintiff under the territorial compensation act which was passed by the Legislature of Alaska in the year 1923. The act provides that "Any person, or persons, partnership, joint stock company, association or corporation employing five or more employees in connec-

tion with any business, occupation, work, employment or industry carried on in this Territory, except domestic service, agriculture, dairying, or the operation of railroads as common carriers who shall not have given notice of his, her, their or its election to reject the provisions of this act in the manner hereinafter provided, or, who having given such notice shall, prior to the time that an employee is injured as hereinafter referred to, have waived the same in the manner hereinafter provided, shall be liable to pay compensation in accordance with the schedule herein adopted, to each of his, her, their or its employees who receives a personal injury by accident arising out of and in the course of his or her employment, or to the beneficiaries named herein, as the same are hereinafter designated and defined, in all cases where the employee shall be so injured and such injuries shall result in his or her death." The act then prescribes what compensation shall be paid to the beneficiaries of the employee in case of death of the employee, and fixes a schedule of payments to be made where an employee receives an injury arising out of and in the course of his or her employment, which results in total and permanent disability or incapacity. Provision is made in the schedule for such [64] injuries where there is a total incapacity or total disability; that is to say, where the employee is totally disabled from any earning capacity.

When this action was originally commenced, the plaintiff alleged that he was totally and perma-

nently incapacitated or disabled from performing labor and the case was tried on that theory—that the plaintiff was totally and permanently incapacitated. When you were excused from the courtroom last evening, that was the status of the case. Afterward, counsel for plaintiff amended his complaint so that the allegations now are that the plaintiff is partially and permanently disabled by reason of an accident occurring in the mill of the defendant.

The act also provides that where any employee received an injury arising out of or in the course of his or her employment, resulting in his or her partial disability, he or she shall be paid in accordance with the schedule therein set forth. In said schedule it is provided that for the loss of a thumb the employee shall be paid so much; for the loss of an index finger, so much; for the loss of a finger other than the index finger, so much; for the loss of a great toe, so much, and likewise for the loss of a toe other than the great toe. Then, for the loss of a hand, the following provisions are put in:

"In case the employee was at the time of the injury unmarried, $1,872;

"In case the employee was married but had no children, $2,496.

"In case the employee was either married or a widower and had one child, $2,496 and $312 additional for each of [65] said children, not to exceed, however, the total sum of $3,120."

I wish you would remember that last clause—"not to exceed, however, the total sum of $3,120."

The schedule goes on to provide for other injuries also and concludes with the provision that "whenever such employee receives an injury, arising out of and in the course of employment, as a result of which he or she is partially disabled, the disability so received is such as to be permanent in character and such as not to come wholly within any of the specific cases for which provision is herein made, such employee shall be entitled to receive as compensation a sum which bears the same relation to the amount he or she would be entitled to receive hereunder if he or she were totally and permanently disabled that the loss of earning capacity of such employee, by reason of the accident, bears to the earning capacity such employee would have had had he or she not been injured, the amount to be paid in no case to exceed Six Thousand Two Hundred Forty Dollars ($6,240).

"To illustrate: If said employee were of a class that would entitle him or her to Six Thousand Two Hundred Forty Dollars ($6,240) under this schedule, if he or she were totally and permanently disabled, and his or her injury would be such as to reduce his or her earning capacity twenty-five (25%) per cent, he or she would be entitled to receive One Thousand Five Hundred Sixty Dollars ($1,560) it being the amount that bears the same relation to Six Thousand Two Hundred Forty ($6,-240) that Twenty-five per cent (25%) does to one hundred (100%) per cent. Should such employee receive an injury that would impair his or her earning capacity seventy-five (75%) per cent, he

or she would be entitled to receive [66] Four Thousand Six Hundred Eighty Dollars ($4,680), it being the amount that bears the same relation to Six Thousand Two Hundred Forty Dollars ($6,-240) that seventy-five (75%) per cent does to one hundred (100%) per cent," or, in other words, that if his incapacity was three quarters, he should receive three quarters of $6,240.

The plaintiff in this action alleges that the defendant is a corporation organized and existing under the laws of the Territory of Alaska. This is admitted by the defendant, and of course, must be taken by the jury to be true. The plaintiff alleges that on the 25th day of April, 1925, he was an employee of said defendant and that on said date he was engaged in performing services for said defendant in its mill as an operator of a trimsaw. This also is admitted in the answer. The plaintiff further alleges that at all the times mentioned in the complaint, the defendant was operating the said mill under a contract with all its employees, including the plaintiff, to pay compensation to said employees for injuries sustained, arising out of and in the course of their employment, according to the provisions of Chapter 98, Session Laws of Alaska, which is the chapter from which I have just read; and that prior to the said 25th day of April, 1925, the defendant agreed with the plaintiff to pay compensation for any injury received in the course of his employment, according to the provisions of the aforesaid act.

This is admitted in the answer and hence must be taken as true.

The fourth paragraph of plaintiff's complaint alleges that on the 25th day of April, 1925, while the plaintiff was engaged as aforesaid, as trimmer and employee of said defendant [67] in its mill, operating a trim-saw therein, and while performing his duties in such capacity in said mill of defendant, the said trim-saw which the plaintiff was operating as aforesaid, became out of order and out of place in such a manner that this plaintiff, without fault or design on his own part, was severely cut on his right hand and that as a result of such injury, said hand became and is now totally and permanently disabled. This allegation has been amended to read that he is now partially and permanently disabled. The plaintiff further alleges that at the time of said injury, the defendant had in its employ in said mill and engaged in the operation of said mill, more than five employees.

It is admitted that at the time of the injury to plaintiff, the defendant employed more than five employees and, of course, came within the provisions of the act which I have read to you.

The defendant, answering this paragraph, denies that the plaintiff was injured by the trim-saw, as described in paragraph IV of plaintiff's complaint, by reason of said saw becoming out of order. Of course, that allegation that the plaintiff was injured by reason of the saw becoming out of order is only material to show that the plaintiff himself did not seek the injury or seek to do the injury. Under

this compensation law, the question of the negligence of the defendant is not at issue at all. Under the common law, which was the law before this compensation act was passed, when a person was injured in the employ of another and the injury was occasioned by the negligence of the employer, the employee could sue for damages for such negligence. He could allege negligence on the part of the employer. But the employer was [68] not liable for negligence if the employee himself was in any way negligent, thereby contributing to the accident or to the injury, or if the injury occurred through the fault of a fellow-workman. So there was always a defense to any action for damages on account of negligence, either contributory negligence or the negligence of a fellow-employee, or what is called the assumption of risk; that is, that the employee assumed the risks incident to the employment. All these defenses are eliminated under this act. There is no question of negligence—the only question is whether an accident occurred—and the employee gets the benefit of the schedule of the act, according to the terms of the act, under our compensation act. This is the modern law on the subject, which has been enacted in most of the States of the Union and in England and Germany as being the most satisfactory way of compensating employees for injuries. It is in the nature of insurance to the employees.

Answering further this paragraph, the defendant admits all the allegations of plaintiff's complaint in paragraph IV, except that it denies that the

plaintiff is totally and permanently disabled. It is not now claimed, however, by the plaintiff that he was totally disabled, but only partially disabled, so that denial does not amount to anything in the answer.

The fifth paragraph of the complaint alleges that at the time of said injury above described, the plaintiff was and now is a married man, having dependent upon him for support, a wife and seven children, and that the plaintiff is and has been for many years dependent altogether upon his labor as a means of earning a living and supporting his [69] family; that prior to said injury plaintiff was capable of earning and did earn, on an average, $6.50 a day, and was at the time of said injury receiving from said defendant the sum of $5.20 a day; that on account of said injury the plaintiff has been ever since the date of said injury, partially disabled; that said injury is of a permanent character and that said plaintiff will continue to be totally disabled from performing manual labor indefinitely; that as a result of said injury the plaintiff has permanently lost the use of his right hand; that prior to said injury the plantiff was in excellent physical condition and at all times fit for manual labor, and that as a result of said injury, plaintiff's nerves have been shattered and his general health impaired. Wherefore, the plaintiff alleges that by reason of the premises he has been damaged in the sum of $6,240, and that the sum of $500 is a reasonable attorney fee to be taxed by this Court as a part of the costs of this action.

Of course, the sixth paragraph you will pay no attention to at the present time. This paragraph is wholly denied by the defendant in his answer. The defendant, in its answer, however, makes an affirmative allegation. It alleges that it is a corporation, organized under the laws of the Territory of Alaska; that the plaintiff has not sustained, by reason of the injury complained of in the complaint an injury causing greater than seventy-five per cent of the loss of the use of the hand; that defendant confesses judgment in the sum of $2,340, that sum being 75% of the loss of the use of the hand to which plaintiff is entitled under the Compensation Law of Alaska; that defendant has paid plaintiff, on account of said injury the sum of $218.40, and that there is now due and owing plaintiff [70] from defendant the sum of $2,340, less $218.40, making a balance of $2,121.60, in which sum defendant now confesses judgment.

It was stipulated in open court, in the presence of the jury that the defendant has paid the plaintiff the sum of $218.40, so therefore that amount will be deducted from any judgment which the defendant may recover. The defendant having confessed judgment in its answer in the sum of $2,121.00, being the balance due according to its theory, judgment will be entered, of course, for that sum no matter what your decision may be.

You will notice that there are two theories—one propounded by the plaintiff and one propounded by the defendant under the terms of this act. It is admitted by the testimony that the injury to the

plaintiff's hand is a permanent injury. It is also admitted in the answer, I believe, that the injury is a permanent injury. It is now claimed, however, that the injury of plaintiff is only a partial permanent injury; that is, a partial disability. Under that the plaintiff claims that he is entitled to receive $6,240 by reason of the fact that the injury is not such as is specified in the schedule. The plaintiff claims that the injury received by him incapacitated him to a greater extent from performing labor than the mere loss of a hand and, therefore, that his compensation should be based upon the loss of his earning capacity alone; that is that the jury should take the sun of $6,240 and base their findings upon a percentage of that amount; and the testimony in this case has been directed solely to what was the loss of the earning capacity of plaintiff by reason of the injury complained of. The defendant, [71] on the other hand, claims that the injury was not equivalent to the loss of a hand and that the plaintiff's compensation should be based on the amount allowed for the loss of the hand or a percentage of that loss.

There are, of course, cases where an injury to a hand and the consequent results from that injury would render the injured party's earning capacity less than that occasioned by the loss of the hand itself, and the testimony in this case has been directed to the point whether or not the loss of the earning power of the plaintiff, resulting from the accident to him, was greater than from the mere loss of a hand, and this question is one for you

to determine from the evidence in the case. If you find that the earning capacity of the plaintiff was lessened to a greater extent by reason of the accident than by the loss of a hand, then you should determine from that what the percentage of loss of his earning capacity was under certain questions which I shall propound to you. If, however, you should find that the disability of plaintiff, resulting from the accident was equal to or less than the loss of the hand, then you should base your final finding on the amount of compensation that the plaintiff is entitled to under the provisions of the act mentioned. To that end I have submitted three questions to you in writing. The first question is, Has the injury to the plaintiff's hand as complained of, diminished his earning capacity more or less than if the hand had been completely severed between the wrist and elbow?

You should answer that yes or no, as you find from the evidence.

The second question is, If the injury to plaintiff's [72] hand has diminished his earning capacity more than if the hand had been completely severed between the wrist and elbow, what is the percentage of loss of earning capacity of plaintiff by reason of such injury?

Question three: If the earning capacity of plaintiff was not diminished more than if he had lost his hand, what is the percentage of loss of earning capacity in comparison with the loss of the hand? That is, the plaintiff, for the loss of the hand would be entitled to $3,120, and it is for you to determine

what the percentage of loss of his earning capacity is in comparison with that. In the other case, the question is what will be the percentage of loss of his earning capacity if he is entitled to $6,240.

If you answer question one that the injury has diminished plaintiff's earning capacity more, you need not answer question three. If you answer question one that it has been diminished less than if the hand had been completely severed, you need not answer question 2.

You, Ladies and Gentlemen, of course, are acquainted with the general rules of law with reference to the testimony of witnesses. You are the sole judges of the facts of the case and of the credibility to be given to the testimony of the different witnesses. You are not bound to find in conformity with the declarations of any number of witnesses against those of a less number or a presumption satisfying your minds. A witness whom you believe to have testified falsely in one part of his testimony may be distrusted in others. You may judge of the credibility of a witness as you would of the credibility of a person telling you any story outside of the courtroom. You may consider their [73] manner of testifying on the stand, whether they are frank and open and give their testimony freely and voluntarily, or whether their manner is such as to make you distrust them if they told their story on the outside. Their interest in the case is an important consideration in determining the value of the testimony of any witness; their opportunity of observing the matters about which

they testify and all such indicia of the truth of the witnesses' stories or accounts may be taken into consideration by you in determining the weight which you will give to any witness' testimony.

This case is a peculiar one. It is not tried according to the general rules of the common law, except that the proceedings are the same in court. Generally in cases of this kind, there are commissions which determine the amount due an injured employee under the compensation act. In this Territory, however, that is not so. The jury decides the amount of compensation to be given to an injured employee under our compensation act, subject to the schedule and the law as given to you by the Court.

You may now retire to consider the questions submitted to you. No other verdict will be rendered than the answers to these questions, because it is a mere matter of calculation, based upon the answers to the questions submitted to you.

Whereupon, in open court and in the presence of the jury, the defendant, by its counsel, took the following exception, which was allowed:

Mr. ZIEGLER.—The defendant excepts to the refusal of the Court to give defendant's requested instruction No. 4, which said requested instruction is as follows, to wit:

"IV. [74]

"You are instructed under the law of Alaska, that according to the evidence in this case, plaintiff cannot recover for more than the loss of a hand."

And thereupon the jury retired for deliberation on a verdict. [75]

[Title of Court and Cause.]

CERTIFICATE OF REPORTER.

I, G. W. Folta, the official court reporter who reported the proceedings and testimony in the trial of the above-entitled cause, hereby certify that the foregoing is a full, true and correct transcript of all the proceedings and testimony, both oral and documentary, offered and introduced in the trial of the foregoing action, and also of all exceptions taken and noted, together with the instructions given in the charge of the Court to the jury, the exceptions thereto and changes therein; and I now certify the foregoing, consisting of 57 pages, to be such transcript.

In testimony whereof I have hereunto signed my name at Juneau, Alaska, this 7th day of July, 1926.

G. W. FOLTA,
U. S. Court Reporter. [76]

[Title of Court and Cause.]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

I hereby certify that I am the Judge by and before whom the above-entitled cause was tried and

that the foregoing bill of exceptions is a full, true and correct account and transcript of the evidence and proceedings had therein and that it contains all the evidence heard and offers of evidence and motions considered at said trial.

I also certify that the said bill of exceptions was duly presented and filed within the time allowed by law and the rules of this court.

I also certify that the Ketchikan term of court referred to in said bill of exceptions has not adjourned.

Wherefore, said bill of exceptions being true and correct, I do now, within the time allowed by law and the rules of this court, allow and settle same, and order it to be filed and to become a part of the records of this cause.

Dated at Juneau, Alaska, this 28 day of July, 1926.

THOS. M. REED,
Judge.

Filed Jul. 28, 1926. [77]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

Ketchikan Lumber & Shingle Company, a corporation, the defendant herein, conceiving itself aggrieved by the final judgment of the Court entered herein on June 7th, 1926, and having filed its assignments of error herein, prays the Court to allow it a writ of error from the Honorable the United States

Circuit Court of Appeals for the Ninth Circuit, and to fix the amount of security which it shall give as a supersedeas to said judgment on such writ of error.

A. H. ZIEGLER,
Attorney for Defendant.

Writ of error allowed. Supersedeas bond fixed at $5,500.00.

Dated this 28 day of July, 1926.

THOS. M. REED,
Judge.

Service admitted this 28 day of July, 1926.

GEORGE B. GRIGSBY,
Attorney for Plaintiff.

Filed Jul. 28, 1926. [78]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the defendant and assigns the following errors committed by the trial court during the progress of the trial of this cause and in the rendition of the final judgment, and upon which the defendant will rely in the Appellate Court for a reversal:

I.

The Court erred in permitting testimony to be produced upon behalf of the plaintiff tending to show the injury suffered by plaintiff was caused by the negligence of the defendant.

II.

The Court erred in refusing to grant defendant's motion for a nonsuit and an instructed verdict in his favor for the reason of insufficiency of evidence to support the allegations of the complaint and on account of a fatal variance between the proofs submitted and the pleadings.

III.

The Court erred in permitting the plaintiff to amend his complaint after the conclusion of the evidence and the completion of arguments to the jury, which amendment substantially changed the cause of action.

IV.

The Court erred in refusing to give defendant's requested instruction No. 4, as follows: "You are instructed under the law of Alaska that according to the evidence in this [79] case plaintiff cannot recover for more than the loss of a hand."

V.

The Court erred in refusing to grant defendant's motion for judgment for the defendant and to set aside the verdict of the jury.

VI.

The Court erred in refusing to grant defendant's motion for a new trial herein.

VII.

The Court erred in entering the judgment in the case offered by the plaintiff over the objections of defendant, for the reason that the judgment is contrary to the evidence and law in the case and that

same was not in accordance with the verdict, findings, facts and law.

VIII.

The Court erred in entering any judgment greater than the amount of judgment confessed by the defendant.

IX.

The Court erred in entering any judgment against defendant, in any event, in a greater sum than $4,056.00 less the sum of $218.00 paid to the plaintiff by defendant.

A. H. ZIEGLER,
Attorney for Defendant.

Service admitted this 28 day of July, 1926.

GEO. B. GRIGSBY,
Attorney for Plaintiff.

Filed Jul. 28, 1926. [80]

[Title of Court and Cause.]

WRIT OF ERROR.

United States of America,—ss.

The President of the United States to the Judge of the District Court of Alaska, Division Number One, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is before you, wherein A. Walker is plaintiff and Ketchikan Lumber and Shingle Company, a corporation, is defendant, a manifest error hath happened to the great damage of the said Ketchikan

Lumber and Shingle Company, a corporation, as by its petition doth appear.

We being willing that error, if any hath happened, shall be duly corrected and speedy justice done to the parties in that behalf, do command you, if judgment be given therein, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things pertaining thereto to the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, State of California, so that you have the same before our said court on or before thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what if right, according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, and the seal of the District Court of Alaska, [81] Division Number One, affixed at Juneau, Alaska, this 28th day of July, 1926.

JOHN H. DUNN.

[Seal] JOHN H. DUNN,
Clerk.

Allowed July 28, 1926.

THOS. M. REED,
Judge.

Service admitted this 28th day of July, 1926.

GEORGE B. GRIGSBY,
Attorney for Plaintiff.

Filed Jul. 28, 1926. [82]

[Title of Court and Cause.]

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS: That we, Ketchikan Lumber & Shingle Company, a corporation, as principal, and J. R. Heckman, Merchant, of Ketchikan, Alaska, as surety, are held and firmly bound unto the above-named A. Walker, plaintiff, in the sum of Five Thousand Five Hundred ($5,500.00) Dollars, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

The condition of the above obligation, however, is such that whereas the above-bounden Ketchikan Lumber and Shingle Company, a corporation, has sued out, or is about to sue out, a writ of error in the above-entitled cause from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered in said cause on the 7th day of June, 1926.

Now, if the said Ketchikan Lumber and Shingle Company, a corporation, shall prosecute its writ of error to effect, and pay all such damages and costs as may be awarded against it if it fail to make good its plea, then this obligation shall be null and void; otherwise to remain in full force and effect.

Dated at Ketchikan, Alaska, July 28, 1926.

KETCHIKAN LUMBER AND SHINGLE COMPANY, a Corporation,
Principal.

By W. C. MITCHELL,
President.

J. R. HECKMAN,
Surety. [83]

United States of America,
Territory of Alaska,—ss.

I, J. R. Heckman, whose name is subscribed to the foregoing bond as surety therein, being first duly sworn, depose and say: That I am a resident, inhabitant and property owner of the Territory of Alaska, Division Number One, and not an attorney or counsellor at law, marshal, deputy marshal, clerk of any court, nor other officer of any court and that I am worth the sum of Eleven Thousand ($11,000.00) Dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

J. R. HECKMAN.

Subscribed and sworn to before me this 28 day of July, 1926.

[Notarial Seal] A. H. ZIEGLER,
Notary Public for Alaska.

Approved to operate as a supersedeas from the filing thereof.

THOS. M. REED,
Judge.

Filed Jul. 28, 1926. [84]

[Title of Court and Cause.]

CITATION ON WRIT OF ERROR.

The President of the United States to A. Walker and to George B. Grigsby, His Attorney, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, State of California, within thirty days from the date of this writ pursuant to a writ of error in the clerk's office of the District Court for Alaska, Division Number One, in a cause wherein Ketchikan Lumber and Shingle Company, a corporation, is plaintiff in error, and you defendant in error, and then and there to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 28th day of July, 1926.

[Seal] THOS. M. REED,
Judge.

Service admitted July 28, 1926.

GEORGE B. GRIGSBY,
Attorney for Defendant in Error.

Filed Jul. 28, 1926. [85]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the District Court for the First Division of Alaska, Juneau, Alaska.

You will please make up a transcript of the record in the above-entitled cause, and include therein the following papers, to wit:

1st. Complaint.
2nd. Demurrer to complaint.
3rd. Amended answer to complaint.
4th. Reply.
5th. Questions and answers thereto propounded to the jury.
6th. Motion for judgment for defendant.
7th. Motion for new trial.
8th. Objection to entry of judgment proffered the court by plaintiff.
9th. Judgment.
10th. Bond on stay of execution.
11th. Bill of exceptions.
12th. Petition for writ of error.
13th. Assignment of errors.
14th. Order allowing writ.
15th. Writ of error.
16th. Bond on appeal.
17th. Citation.
18th. This praecipe. [86]

Said transcript to be made up in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

A. H. ZIEGLER,
Attorney for Defendant.

Filed Jul. 28, 1926. [87]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached eighty-seven pages of typewritten matter, numbered from 1 to 87, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record, as per praecipe of plaintiff in error, on file herein and made a part hereof, in the cause wherein Ketchikan Lumber and Shingle Company, a corporation, is plaintiff in error, and A. Walker, is defendant in error, No. 871–KA, as the same appears of record and on file in my office; and that the said record is by virtue of a writ of error and citation issued in this cause, and the return thereof, in accordance therewith.

I do further certify that the transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Thirty-seven and 50/100 Dollars ($37.50), has been paid to me by counsel for plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 11th day of August, 1926.

[Seal] JOHN H. DUNN,
Clerk. [88]

[Endorsed]: No. 4946. United States Circuit Court of Appeals for the Ninth Circuit. Ketchikan Lumber and Shingle Company, a Corporation, Plaintiff in Error, vs. A. Walker, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Division Number One.

Filed August 19, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.